Chan Whye & Sons Contractors (suing as a firm) v Sarawak Shell Bhd

HIGH COURT (MIRI) — SUIT NO 22–31 OF 1998(MR)
SULAIMAN DAUD J
18 OCTOBER 2002

Contract *— Termination — Validity — Whether 'contract of service' or 'contract for service' — Contract was entered between two entities that are not legal persons — Whether unilateral termination a violation of natural justice and fairness — Approach of court where terms of contract clear and unequivocal*

The plaintiff is a partnership while the defendant is a company that owns and operates an oil refinery. The plaintiff entered into an agreement with the defendant to carry out all works associated with the maintenance of the defendant's oil refinery equipment. The contract was for an initial period of three years. However, the defendant has the option to extend the duration thereof for a further period of one year by giving the plaintiff notice in writing. The defendant exercised the said option whereupon the contract was further extended. Notwithstanding the extension, the defendant terminated the contract about eight months before the expiry of the terms thereof. The plaintiff asserted that the contract is a contract of service and that the plaintiff and their workmen are employees of the defendant. By reason thereof, the termination of the contract is tantamount to the dismissal of the plaintiff and their employees or workmen. The plaintiff also complained that the unilateral termination of the contract without giving them and their workers the right to be heard is a violation of the principle of natural justice and fairness.

Held, dismissing the plaintiff's action with costs to the defendant to be taxed:

(1) There is no merit in the contention that the contract is a contract of service for the reason that the said contract was entered between two entities that are not legal persons. The plaintiff is suing as a firm and the defendant is a registered company. A contract of service or a contract of employment only involves the relationship between a person as an individual and another person or body of persons. In other words, only an individual person can be employed or engaged in a contract of service. In the present case, it is obvious that the plaintiff is a firm and the contractual relationship created under the said contract must be that of a contract for service whereby the plaintiff was engaged as an independent contractor for the purpose of carrying the work specified thereunder (see pp 72H–73A).

(2) The termination clause of the agreement is clear and equivocal. The court must not rewrite the contract or audit the bargain

between the parties but instead hold them to the contract they had made for themselves by giving effect to the clear and unequivocal words of the termination clause. The contract was validly terminated in accordance thereof (see p 75E–F); *Wong Pa Hock v American International Assurance Co Ltd & Anor* [2002] 2 CLJ 267 followed.

[Bahasa Malaysia summary

Plaintiff adalah satu perkongsian sementara defendan adalah sebuah syarikat yang memiliki dan mengendalikan satu kilang penapisan minyak. Plaintif telah memasuki satu perjanjian dengan defendan untuk menjalankan semua kerja berkenaan penyelenggaraan peralatan kilang penapisan minyak defendan. Kontrak tersebut adalah untuk tempoh permulaan selama tiga tahun. Bagaimanapun, defendan mempunyai pilihan untuk melanjutkan tempoh selama setahun dengan memberikan plaintif notis bertulis. Defendan telah melaksanakan pilihan tersebut di mana kontrak tersebut telah dilanjutkan. Walaupun dengan perlanjutan tersebut, defendan telah menamatkan kontrak tersebut, lebih kurang lapan bulan sebelum tempoh luput terma-terma tersebut. Plaintif menegaskan bahawa kontrak tersebut adalah satu kontrak perkhidmatan dan bahawa plaintif dan pekerja-pekerja buruhnya adalah pekerja-pekerja defendan. Oleh sebab demikian, penamatan kontrak tersebut sama seperti pemecatan plaintif dan pekerja-pekerja buruh atau pekerja-pekerja mereka. Plaintif juga mengadu bahawa penamatan kontrak di satu pihak tanpa memberikan mereka dan pekerja-pekerja mereka hak untuk didengar adalah satu pencabulan prinsip keadilan asasi dan keadilan.

Diputuskan:

(1) Tidak ada merit dalam pendapat bahawa kontrak tersebut adalah satu kontrak perkhidmatan oleh sebab kontrak tersebut telah disempurnakan antara kedua-dua pihak yang bukan orang di sisi undang-undang. Plaintif menyaman sebagai satu firma dan defendan sebagai satu syarikat berdaftar. Satu kontrak perkhidmatan hanya melibatkan perhubungan antara seseorang sebagai satu individu dan seorang lain atau sekumpulan orang. Dalam erti kata lain, hanya seorang individu boleh bekerja atau diambil bekerja dalam satu kontrak perkhidmatan. Dalam kes semasa, adalah jelas bahawa plaintif adalah sebuah firma dan hubungan kontraktual yang dibentuk di bawah kontrak tersebut semestinya satu kontrak untuk perkhidmatan di mana plaintif diambil bekerja sebagai satu kontraktor bagi tujuan menjalankan kerja-kerja yang telah disenaraikan di bawah kontrak tersebut (lihat ms 72H–73A).

(2) Penamatan klausa perjanjian tersebut adalah jelas dan taksa. Mahkamah tidak harus menulis balik kontrak tersebut atau

mengaudit tawaran di antara pihak-pihak tersebut tetapi sebaliknya memutuskan bahawa mereka perlu mematuhi kontrak yang telah mereka buat dengan memberikan kesan terhadap perkataan-perkataan yang jelas dan tidak taksa dalam klausa penamatan tersebut. Kontrak tersebut telah ditamatkan dengan sah menurut yang demikian (lihat ms 75E–F); *Wong Pa Hock v American International Assurance Co Ltd & Anor* [2002] 2 CLJ 267 diikut.]

Notes

For cases on validity of the termination of contract, see 3 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 4193–4196.

Cases referred to

Massey v Crown Life Insurance Co [1978] ICR 590 (refd)
Wong Pa Hock v American International Assurance Co Ltd & Anor [2002] 2 CLJ 267 (folld)

Legislation referred to

Federal Constitution art 8
Labour Ordinance of Sarawak s 2

Tai Choi Yu (*Tai Choi Yu & Co*) for the plaintiff.
Jimmy HT Wee (*Jimmy HT Wee & Co*) for the defendant.

Sulaiman Daud J: The plaintiff is a partnership while the defendant is a company which owns and operates an oil refinery at Lutong. On 21 May 1991, the plaintiff entered into an agreement with the defendant to carry out all works associated with the maintenance of the defendant's oil refinery equipment within the Lutong refinery ('the contract'). The contract, identified as No 2386, consists of the following constituent parts, namely:

Part 1	—	Form of agreement.
Part 2	—	Conditions of contract
Part 3	—	Schedule of prices and rates
Part 4	—	Scope of work.
Part 5	—	Provisions by contractor.
Part 6	—	Provisions by company.
Part 7	—	Specifications.
Part 8	—	Drawings
Part 9	—	Administration procedure
Part 10	—	Contractor's execution plan.

The contract is for an initial period of three years effective from 1 May 1991. However, the defendant has the option to extend the duration thereof for a further period of one year by giving the plaintiff notice in writing at least 30 days prior to the end of the initial three years' period. On 19 April 1994, the defendant exercised the said option whereupon the contract was further extended to 30 April 1995. On 19 July 1994, the plaintiff made a

written request to the defendant to extend the said contract for another four or five years based on the existing contract rates, terms and conditions. Subsequently, the defendant, by a letter dated 14 February 1995, forwarded to the plaintiff the proposed amendment to the extension option contained in cl 5(b) of Pt 1 of the contract, which in so far as relevant, reads as follows:

> Form Of Agreement to incorporate three (3) new Extension Options, viz second, third and fourth Extension Options respectively. The two Extension Options are for a period of three years. The third and fourth Extension Options are for a period of one (1) year each. The Company, at its absolute discretion, may exercise the third and fourth Options by giving the Contractor at least thirty (30) days notice in writing prior to the expiry of the Contract Period.

In the same letter, the defendant also proposed to exercise the second extension option as stated in the amendment. The written proposal was duly accepted by the plaintiff and the contract was extended for another three years beginning from 1 May 1995 to 30 April 1998. Notwithstanding the extension, the defendant by a letter dated 25 July 1997 terminated the contract, about eight months before the expiry of the terms thereof.

The plaintiff in their pleading asserted that the contract is a contract of service and that the plaintiff and their workmen are employees of the defendant. By reason thereof, it is pleaded that the termination of the contract is tantamount to the dismissal of the plaintiff and their employees or workmen. The plaintiff also complained that the unilateral termination of the contract without giving them and their workers the right to be heard is a violation of the principle of natural justice and fairness. It is also the plaintiff's case that the defendant, by awarding a new integrated maintenance contract to another contractor based on race, have infringed the plaintiff's constitutional right under art 8 of the Federal Constitution. For the said reason, the plaintiff averred that they have suffered loss and damage, and by this writ of summons claimed against the defendant for the following reliefs:

(1) a declaration that the said contract is a contract of service;

(2) a declaration that the plaintiff and their workers or team of workers or workmen working and rendering services under the said contract were workers and employees of the defendant;

(3) alternatively, a declaration that the defendant is liable to the plaintiff for breaches of contract;

(4) special damages;

(5) general damages for breach of contract, including exemplary damages.

The defendant admitted that the plaintiff was awarded the said contract but denied that the same is contract of service. It is averred that the said contract was terminated in accordance with the terms and conditions thereof, and that there is no express provisions therein which entitled the defendant to prior consultation or other procedural safeguards before terminating the contract. The defendant also asserted that the allegation of racial

discrimination and the infringement of the constitutional right in the statement of claim are frivolous and vexatious. A

In my opinion, from the pleading and submissions of parties, the issues that arose for determination in the present action are as follows:

(1) whether the said contract is a contract of service or contract for service; B

(2) whether the unilateral termination of the said contract is ultra vires, null and void;

(3) whether the defendant is liable to the plaintiff for breach of contract.

Whether contract of service or contract for service C

Mr Tai Choi Yu, the learned counsel for the plaintiff submitted that the said contract is a contract of service and that the unilateral termination thereof without giving the defendant the right to be heard is in breach of the principle of natural justice. The learned counsel pointed out that the contract, as stated in the recital thereof, is for the 'contractor to carry out all D the works associated with the maintenance of the refinery equipment within the Lutong refinery'. As such, he argued that the plaintiff's services formed an integral part of the defendant's refinery business and has therefore met the essential requirement of a contract of service.

In support of his contention, Mr Tai Choi Yu also relied on the E evidence of PW2 and PW3, the plaintiff's employees, who testified that they worked under the supervision and upon the instruction of the defendant's supervisors. According to the learned counsel, based on the testimonies of PW4 and PW5, the defendant's supervisors, the spare parts of the work carried out by the plaintiff were also supplied by the defendant and that the plaintiff's works were inspected by, and subject to the supervision and final F approval of, the defendant. He pointed out the plaintiff's employees were also required to work overtime at the behest and instruction of the defendant.

The learned counsel also referred to other relevant clauses in the said contract including cl 7 of the Condition of Contract, and Pt 3 on the G Schedules of Prices and Rates. Under the said cl 7 the defendant is empowered to request the plaintiff to remove any of their employees, while Pt 3 contained the Schedule of Prices and Rates in respect of the specified work. In addition, the learned counsel also argued that by virtue of the definition of 'employer' in s 2 of the Labour Ordinance of Sarawak (Cap 76) the plaintiff's employee also has the right to sue the defendant as principal. H He also pointed out the said Ordinance makes no distinction between a contract of service and contract for service.

I will at once say that there is no merit in the contention that the contract is a contract of service for the very reason that the said contract was entered between two entities which are not legal persons. The plaintiff is I suing as a firm and the defendant is a registered company. In my view, a contract of service or a contract of employment only involves the relationship between a person as an individual and another person or body

of persons. In other words, only an individual person can be employed or engaged in contract of service. In the present case, it is obvious that the plaintiff is a firm and the contractual relationship created under the said contract must be that of a contract for service whereby the plaintiff was engaged as an independent contractor for the purpose of carrying the work specified thereunder. With respect, I also do not find any basis to invoke the provisions of the Labour Ordinance to establish the relationship between the parties as the said Ordinance only regulates the relationship between workers, who are natural persons, and their employer.

Even if the present suit was taken up by the plaintiff's employees, there is still no basis to justify a finding on the existence of a contract of service between them and the defendant. The question whether a contract is a contract of service or for service is a mixed question of law and fact. In determining the true relationship between the parties, Lord Denning MR in *Massey v Crown Life Insurance Co* [1978] ICR 590 stated at p 594 as follows:

> ... The law, as I see it, is this: if the true relationships of the parties is that of master and servant under a contract of service, the parties cannot alter the truth of that relationship by putting a different label upon it. .... On the other hand, if their relationship is ambiguous and is capable of being one or the other [ie either service or agency], then the parties can remove the ambiguity, by the very agreement itself which they can make with one another. The agreement itself then becomes the best material from which to gather the true legal relationship between them ... .

In the instant case, the relationship between the parties is expressly provided in cl 26(5) of the Condition of Contract, which read as follows:

> Independence of the Contractor
>
> (a) The Company (the defendant) shall have the right to instruct and direct the Contractor (the plaintiff), as to the result to be obtained under the Contract. However, the Contractor shall act as an Independent Contactor with respect to the Work and shall exercise the control, management and direction of its execution to obtain the results required by the Contract.
>
> (b) Neither the Contractor nor any employees, servants, agents, or representatives of either shall be deemed to be employees, servants, agents, or representatives of the Company in the performance of the Contractor's obligation hereunder.

It is apparently clear from the above clause that it is not the intention of the parties to create a master and servant relationship between them or between the plaintiff's employees and the defendant. Such finding is further fortified by the terms of the contract itself where all references to 'employee' relate to the employees of the contractor. The contention that the plaintiff or their employees are also employees of the defendant is obviously misconceived and without merit.

Further, it is also the condition of the contract for the plaintiff to provide the tools and equipment for the work, to pay all taxes levied upon them, to indemnify the defendant for loss of property and claim against injuries by the plaintiff's employee and to provide insurance coverage to their employee.

PW2 and PW3 also testified that their salaries and employee provident funds were all paid by the plaintiff. The condition of contract also provides for the retention of 10% of the money due to the defendant. The cumulative effect of all these terms and conditions are consistent with that of a contract for service. The procedural safeguards, such as the right to consultation and the right to be heard, afforded in terminating a contract of service is not in my view applicable to the present case.

Whether the unilateral termination of the said contract is ultra vires, null and void

It is not disputed that the said contract was further extended to 30 April 1998. However, it was earlier terminated by the defendant by their letter dated 25 July 1997, which in so far as relevant, reads as follows:

> Dear Sirs,
> Contract No: 002386
> Contract Title: Maintenance of Refinery Equipment
> Subject: Termination of Contract
>
> ---
>
> Reference to our letter ref OCS/22-071/95 dated 14 February 1995, the subject contract was extended from 1 May 1995 to 30 April 1998.
>
> Please be advised that in accordance with Part 2: Condition Of Contract, Clause No 11: Termination, we are terminating this Contract (CN 002386) with effect from 1 September 1997 (000 hrs). We thank you for your cooperation and good work done under this Contract.
>
> Please liaise with Mr Tey Bum Beng (OMLE) for demobilization and settlement of any outstanding issue.
>
> Please acknowledge receipt of the document by signing and returning the copy of this letter to Mr Gregory Yap (EPB-PPS-GT).

Mr Tai Choi Yu submitted that the defendant, by unilaterally and prematurely terminating the contract without assigning any reason therefore, is guilty of breach of contract and is liable to the plaintiff in respect of damages arising therefrom. A number of cases have been cited by the learned counsel in support of his contention which I shall say at once are only relevant to the termination of an employee under a contract of service and not that of an independent contractor under a contract for service.

Mr Jimmy Wee, for the defendant, on the other hand argued that the parties have entered into a contract on the clear basis that the defendant had the right to terminate the contract by giving written notice and the parties must therefore be held to their bargain. It is not for the court to re-write or re-bargain the deal for the parties. The learned counsel cited the case of *Wong Pa Hock v American International Assurance Co Ltd & Anor* [2002] 2 CLJ 267, where a contract of agency was terminated pursuant to a termination clause which provided that the '... agreement may be terminated without giving any reason therefore ... by either party upon 15 days' notice in writings'. It was held that the said contract was lawfully terminated in accordance with the termination clause although the agent was not given the right to be heard.

A In the present case, there is an express provision in cl 11 of the said contract dealing with the termination thereof. The said clause provides as follows:

(1) The Company, may at any time, terminate the Contract by written notice to the Contractor.

B (2) If the Company terminates the Contract because of a breach of contract by the Contractor then the Contractor shall only be paid for the Work properly completed under the Contract up to the date of termination less any additional costs incurred by the Company as a result of the breach of Contract.

(3) If the Company terminates the Contract for any other reason the C Company shall pay to the Contractor:

(a) for all Work properly performed up to the date of termination plus;

(b) the unavoidable cost to the Contractor of canceling commitments necessary to perform the Work because of the termination.

It is clear from the said cl 11 that it not only empowers the defendant to D terminate the said contract, but also governs the rights and obligations of the parties in the event of such a termination. In other words, the said contract has a built in mechanism for its termination. If it is terminated by reason of a breach of contract by the plaintiff, then cl 11(2) shall apply but if the same is terminated for any other reason, the rights and obligations of the parties will be governed by cl 11(3) thereof. In the present case, the E reason given for the termination of the contract is to provide for an integrated maintenance service for the Lutong refinery (see paras 16 and 17 of the affidavit of DW1 in exh D1). Such a termination is therefore governed by the said cl 11(3).

It seems to me that the termination clause aforesaid is clear and F equivocal. I agree with the observation made by his Lordship Clement Skinner J in *Wong Pa Hock* that the court must not rewrite the contract or audit the bargain between the parties, but instead hold them to the contract they had made for themselves by giving effect to the clear and unequivocal words of the termination clause. For the reasons stated I hold that the contract was validly terminated in accordance with cl 11(1) thereof. G However the plaintiff will be entitled to payment in respect of the matters set out in the said cl 11(3)(a) and (b). It appears to me from the pleading that the plaintiff's action against the defendant herein is not made pursuant to that clause and the reliefs claimed are also not related thereto.

In view of my finding on the two principal issues aforesaid, I also hold H that the defendant is not liable to the plaintiff for breach of contract.

For the reasons stated above, I dismiss the plaintiff's action with costs to the defendant to be taxed.

Plaintiff's action dismissed with costs to the defendant to be taxed.

I Reported by Peter Ling